



POLICE DEPARTMENT

April 17, 2015

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Kimberly McCarthy
Tax Registry No. 942262
88 Precinct
Disciplinary Case No. 2014-11323

The above member of the Department appeared before me on February 20, 2015, and March 13, 2015, charged with the following:

1. Said Police Officer Kimberly McCarthy, on or about May 15, 2013, at approximately 1015 hours, while assigned to the 88th Precinct and on duty, in the vicinity of Flushing Avenue and Vanderbilt Avenue, Kings County, did engage in conduct prejudicial to the order, efficiency, or discipline of the New York City Police Department, in that she threatened Person A with the use of force, in that she drove and rammed a Department vehicle in an erratic manner, so as to stop Person A from riding her bicycle.

PG 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT-
PROHIBITED CONDUCT

The New York City Civilian Complaint Review Board (CCRB) was represented by Andre Applewhite, Esq., and Respondent was represented by John Tynan, Esq., Respondent, through her counsel, entered a plea of Not Guilty to the charge. The CCRB submitted a transcript of their September 20, 2013 interview of Person A as hearsay evidence, and called Addison Blakemore as a witness. Respondent testified on her own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

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After evaluating the testimony and the evidence presented at the hearing and assessing the credibility of the witnesses, this tribunal finds that the preponderance of the credible evidence did not establish that the Respondent engaged in the charged misconduct.

FINDINGS AND ANALYSIS

It is undisputed that on May 15, 2013, Respondent was working 7:05 a.m. to 3:40 p.m. and was assigned to patrol in an RMP with partner Police Officer Evelyn Torres. At approximately 10:15 a.m., they were in the vicinity of Vanderbilt and Flushing Avenues in Brooklyn. The intersection was known to be a collision-prone area and Respondent had previously written summonses for traffic violations at that location. At this approximate time, Respondent and Torres were inside their stopped RMP on Flushing Avenue facing eastbound and Torres was writing a summons to a bicyclist who had failed to stop for a red light at the intersection. (Tr. 46-48)

While Torres was writing the ticket, Person A rode her bicycle on Vanderbilt Avenue and turned onto Flushing Avenue. Respondent and Torres followed behind Person A and then drove next to her on Flushing Avenue. Respondent directed Person A to pull over her bike at least two times. Person A did not pull over in response to Respondent's directions. Respondent and her partner drove their RMP in front of her and stopped. The RMP never touched Person A or her bicycle.¹ When the RMP was in front of Person A she stopped and got off her bicycle. She did not fall and was not injured in any way. After she got off of her bicycle, Person A stated that the driver of the police vehicle

¹ A Stipulation was entered into between the parties that the RMP never came in contact with either Person A or her bicycle.

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exited and walked toward her as she was withdrawing her baton (CCRB Exhibit (X) 1, p. 6). After she got off of her bicycle, Person A was given a summons for riding her bicycle through a red light and a summons for reckless driving. (Tr. 49-55; CCRB Exhibit X1, pp. 4, 32-33, 45-47).

The areas of dispute in this case revolve around how Respondent drove the RMP while she was attempting to get Person A to pull over. Respondent testified that she saw Pohan ride through a red light and that she then drove the RMP and followed Person A westbound down Flushing Avenue. According to Respondent, when Person A was riding on the double yellow line separating west and eastbound traffic, Respondent went into the eastbound lane to get past other traffic going westbound between her and Person A. Respondent testified she then returned to the westbound lane to pull in front of Person A. Respondent testified that she did this twice before Person A got off her bicycle. Respondent estimated she drove the RMP approximately five to ten blocks before Person A got off her bicycle and that approximately a minute and a half elapsed between when she saw Person A go through the red light until she stopped the RMP. Respondent also testified that she had the RMP's lights on, used a horn activated rumbler siren and used a loud speaker to order Person A to stop while she was driving the RMP, to no avail (Tr. 49-57).

CCRB presented the hearsay evidence of Person A and the testimony of Addison Blakemore to establish that Respondent engaged in misconduct during the stop. The nature of Person A's hearsay statement is not inherently reliable on its own. Her statement contains extreme statements, which she later modifies, and uncertainties which should be put to a test of cross-examination and not just accepted at face value. Person A initially stated to CCRB that the RMP was next to her and the driver was telling her to pull her

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bike over but that when she questioned the driver, the police “started to drive the car into me.” (CCRB X1, p. 4) She again states that “the driver drives into me (emphasis added) and I stop my bike ... they’re (sic) front wheel is on my front wheel.” (CCRB X1, p. 5). Person A later states that Respondent **did not make contact with her** (emphasis added) and therefore did not drive into her and the RMP’s wheels were not on her front wheel but were rather an inch away (CCRB X1, p. 27).

Person A’s statement contains other uncertainties in areas directly relevant to the charges in this case. In her statement she does not demonstrate that she has a completely clear recollection of what happened. She is not sure if the police “rammed” their RMP into her two, three or four times. Her uncertainty is clearly evident in that she states, “...I’m thinking maybe they just rammed into me and then they’re going to keep going.” (CCRB X 1, pp. 5-6). Also, if they “rammed” into a bicycle, there would be damage to the bicycle and possible injury to Person A.

Another area of Person A’s statement which is open to question and not inherently reliable, is her description of the period of time when the police are stopped and talking to her. According to Person A, she is just standing there and “then they start driving forward again so then I’m going forward and then they ram their car close to my front wheel.” (CCRB X1, p. 5). It does not seem to make sense that Person A was stopped and talking to the police and then they chose to drive forward before she moves again.

Person A’s hearsay evidence, while it is admissible in an administrative tribunal, it must be sufficiently probative and reliable to be accorded probative weight. *Ayala v. Ward*, 170 A.D. 2d 235, 565 N.Y.S. 2d 114 (1st Dep’t 1991), *lv. to app. den.*, 78 N.Y. 2d 851, 573 N.Y.S. 2d 69 (1991). Where, as here, the hearsay evidence is controverted, a

fact finder must very carefully scrutinize the nature and reliability of the out of court statement. *In re Matter of 125 Bar Corp. v. State Liquor Authority of the State of NY*, 24 N.Y. 2d 174 (1969). Based on the above, Person A's statement was not found to be reliable.

While the CCRB also presented the testimony of Blakemore at trial, his testimony had serious defects in it as well. With regard to Blakemore's account concerning the areas of dispute in this case, his testimony is relatively brief and is lacking in details. He testified that when he first started observing the incident, the police vehicle was behind the cyclist and saw that it "aggressively sped up and cut the cyclist off" (Tr. p. 24) His elaboration of what he meant by cutting off the cyclist is that the patrol car was "sort of poking into the bike lane." (Tr. p 25). Blakemore does not provide enough detail to support Person A's statements that the police were "driving into her" or trying to "ram" into her.

Respondent, on the other hand, testified credibly that she put her lights on, hit the horn, directed Person A to pull over twice using the loud speaker and eventually had to drive around Person A to get her to stop. Blakemore was likely unfamiliar with these police tactics and seemed to only observe the last segment of the encounter when he came upon the incident.

In addition, Blakemore's observation of the incident was called into question in that he incorrectly described the race of the driver of the RMP. He testified that he was "mostly sure" that the driver of the RMP was an African-American female (Tr. p. 28), which does not match the description of the Respondent or of the driver as given by Person A who described her as white (CCRB X1, p. 25). Finally, although this is not central to the misconduct charged in this case, Blakemore mentions nothing about seeing

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Respondent approach Person A with a baton in her hand, as Person A described. This inconsistency again calls into question the reliability of the evidence provided by both of these witnesses.

RECOMMENDATION

In conclusion, there is not sufficient reliable evidence in this case to prove by a preponderance of the credible evidence that Respondent threatened Person A with the use of force and therefore it is recommended that Respondent be found Not Guilty.

Respectfully submitted,

Claudia Daniels-DePeyster KM

Claudia Daniels-DePeyster
Assistant Deputy Commissioner – Trials

APPROVED

JUN 19 2018
William J. Bratton
WILLIAM J. BRATTON
POLICE COMMISSIONER